STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:

The Application for Certification for the
CARLSBAD ENERGY CENTER
PROJECT

Docket No. 07-AFC-6

APPLICANT'S RESPONSE TO CITY OF CARLSBAD'S MOTION TO REOPEN PROCEEDING AND ACCEPT TESTIMONY AND EXHIBITS

March 28, 2011

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I. INTRODUCTION

On March 14, 2011, more than one year after the close of the evidentiary hearing ("Evidentiary Hearing") and the evidentiary record in the Carlsbad Energy Center Project ("CECP") siting proceeding, Intervenors City of Carlsbad and the Carlsbad Redevelopment Agency (collectively, the "City") filed a Motion to Reopen [the CECP] Proceeding and Accept Testimony and Exhibits ("Motion"). The City claims it is requesting the record be reopened for select topics, including Worker Safety, Once-Through Cooling, the I-5 Widening Project, and the City's SP 144 Redevelopment, Interceptor Sewer Plant, and Coastal Rail Trail. The City further claims that certain materials and testimony relating to these topics are relevant to the CECP proceeding and should be part of the record. To that end, Carlsbad Energy Center LLC ("Applicant") submits its opposition herein to the City's Motion.

As has been set forth in Applicants previous filings related to this issue, the Committee should only reopen the evidentiary record to admit evidence that is demonstrably relevant to the proceeding and with good cause shown as to why such evidence was not presented during the Evidentiary Hearing held February 1 through February 4, 2010. Here, the City fails to

demonstrate good cause or that the "evidence" the City seeks to admit is discernibly relevant evidence that would be different from that presented during the Evidentiary Hearing or in any post-hearing brief. To that end, the Committee should rightfully deny the City's Motion.

II. ARGUMENT

Applicant does not deny that the Energy Commission regulations on power plant site certification provide that "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs." (20 Cal. Code Regs., § 1212(a).) Further, Applicant agrees that each party to a siting proceeding has the right to submit testimony and other evidence, subject to the exercise of the lawful discretion of the presiding committee member. (20 Cal. Code Regs., § 1712(b).) Moreover, Applicant recognizes that the Committee may take official notice of "any generally accepted matter within the commission's field of competence, and of any fact which may be judicially noticed by the courts of this state." (20 Cal. Code Regs., § 1213.) However, at this late stage of the siting process, only the most critical evidence, that which could not have been produced or which was improperly excluded at the Hearing or substantive data based on evidentiary facts not known at the time of the Hearing, should be considered. Otherwise, the siting process will continue to linger indefinitely without resolution or a final decision.

A. The City Fails to Demonstrate Good Cause to Allow Late "Evidence"

The Committee should not grant the City's Motion as the City fails to demonstrate good cause to allow reopening of the record. Moreover, in its Motion, the City erroneously asserts that "**the parties** have recognized that a number of documents affecting this Committee's determination have been issued [post-hearing]." (City's Motion at p. 1; *emphasis added.*) To the contrary, Applicant is certain that all relevant testimony, documents, and environmental review analyses were timely and properly presented before the CECP Siting Committee both during the

Evidentiary Hearing and in the requisite briefing of topics set forth in the Committee's post-hearing briefing schedule. (*See* Committee's Briefing Order and Revised Schedule, July 12, 2010 ("Committee's Order").) In fact, pursuant to the Committee's Order, the City timely filed its post-hearing brief, which was 156-pages long and addressed in detail each topic identified in the instant Motion. (*See* City's Opening Brief in Opposition to CECP and on Requested Briefing Topics, August 19, 2010.)

Finally, an exception to the rule limiting evidence to the record before the Commission exists when there is "relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing." (*Western States Petroleum Ass'n. v. Superior Court* (1995) 9 Cal. 4th 559, 578.) Here, the City requests the Committee to consider "evidence" that did not exist prior to or during the Evidentiary Hearing. In fact, every instance or item the City requests the Committee consider for purposes of making a determination on CECP occurred **after** the Evidentiary Hearing. (City's Motion at pp. 2-5.)

The parties have had ample time and were provided ample opportunity to provide evidence and testimony, as well as legal briefs, on all topics required to be addressed pursuant to both the Warren-Alquist Act and the Committee's post-hearing briefing order. For these reasons, the City fails to demonstrate any good cause why the CECP record must be reopened for purported "evidence" that is not discernibly relevant from that which has already been presented to the Committee.

B. Closing of Record Allows for Finality of Proceeding

"The point of closing the record to receipt of additional evidence is presumably to bring order to the decision making process, enabling permit issuers to manage dockets efficiently and to bring finality to permit proceedings." (*Appeal of Columbia Gulf Transmission Company* (July 3, 1990), United States Environmental Protection Agency, PSD Appeal No. 88-11, at pp. 4-5

("*Appeal of Columbia Gulf*".) Intervenors' continued requests to supplement the record with new testimony, post-hearing news articles, and post-hearing events or reports is precisely why agencies close evidentiary records and only reopen the same upon showing of good cause.

The City's instant Motion seeks to introduce new evidence into the record, including events that occurred at various power plants within the United States **after** the close of the Evidentiary Hearing. Such information cannot be considered as part of the CECP evidentiary record because the types of events described in the City's Motion occur at any given time in any given location on the planet. If the Commission were to consider new information brought about by events or news happenings after the close of every evidentiary hearing, no developer would receive the applicable permits to begin development of any project because the record would never close.

Moreover, agencies that play a role in the redevelopment of cities, counties, or even in California's complex energy policy, issue new reports and new ordinances or policies based on the ever-changing needs of the population and environment. For example, the City points to the State Water Resources Control Board's Once-Through Cooling Policy[1] as if it will affect the outcome of the Commission's final decision. What the City fails to recognize is that CECP will be built and operated and the corresponding existing Units 1, 2 and 3 and associated ocean water intake will be retired in compliance with all laws, ordinances, regulations, and statutes, including, if applicable, the Once-Through Cooling Policy.

Furthermore, the City identifies its plans for a zoning change pursuant to SP 144. This particular issue was discussed extensively by the City both at the Evidentiary Hearing and in the

[1] As has been previously addressed in this siting procedure, the California State Water Resources Control Board adopted the Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling on May 4, 2010. This Policy was docketed in this proceeding prior to the post-hearing briefing. (*See* Memorandum on Post-Evidentiary Events, from Richard Ratliff to the Carlsbad Energy Center Project Siting Committee and Hearing Advisor Paul Kramer, May 27, 2010.)

City's and other parties' post-hearing briefs. (*See, e.g.,* City's Opening Brief in Opposition to CECP and on Requested Briefing Topics, August 19, 2010, at pp. 56-59 and 94-95.) To the extent that any subsequent changes to SP 144 have since occurred, such changes would have no bearing on CECP.

In addition, the City erroneously states that Applicant filed a letter with the City that "finally admits the CECP is incompatible with the sewer line and sewer line upgrade." (*See* City's Motion at pp. 4-5.) This statement is patently false. Applicant made no such admission or statement. For the sake of clarity, Applicant includes herewith as Attachment A Applicant's correspondence to which the City refers. (Attachment A, Correspondence from Ron Rouse, Esq. on behalf of NRG Energy, Inc., March 7, 2011.) A short review of Attachment A represents the gross mischaracterization of the City.

If the Commission allows a party or intervenor to reopen the evidentiary record each time an agency issues a report that discusses a topic related to a particular project, the Commission will never be able to close the evidentiary record and will invite endless requests similar to the City's Motion through and potentially including the day the Commission issues a final decision. Closure of the record is critical to bringing forth finality to CECP's siting process.

For these reasons, the Committee must opine that the record remain closed.

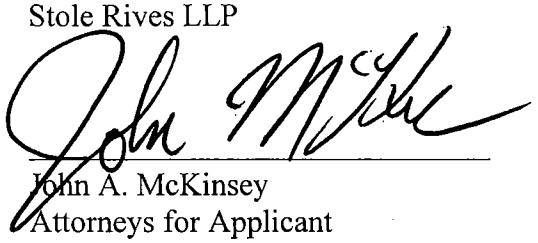
III. CONCLUSION

The Committee should maintain the finality of certainty of the evidentiary record in order to avoid endless motions and petitions seeking to admit irrelevant information. The City's

Motion does not seek to admit any relevant information that has not already been briefed or presented to this Committee. Accordingly, the City's Motion should be DENIED.

Date: March 28, 2011

Stole Rives LLP



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ATTACHMENT A

CORRESPONDENCE FROM RON ROUSE, ESQ. TO CITY OF CARLSBAD CITY COUNSEL
(MARCH 7, 2011)

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March 7, 2011

HAND-DELIVERED

Mayor Hall and City Council Members
City of Carlsbad
1200 Carlsbad Village Drive
Carlsbad, CA 92008

Re: City Council/Redevelopment Commission Agenda March 8, 2011 Item #14 (Agenda Bill #20,478)

NRG Energy, Inc. and Cabrillo Power I LLC Objections to Approval of Agua Hedionda Sewer Lift Station and Sewer/Water Pipelines/Facilities

Dear Mayor Hall and Council Members/Commissioners:

We are special counsel to NRG Energy, Inc. and Cabrillo Power I LLC (collectively "NRG") and submit the following objections on their behalf to the City's proposed approval of the multiple Agua Hedionda Sewer Lift Station and associated Sewer/Water pipelines and facilities identified in the above referenced Agenda Bill #20,478 (collectively the "Project"). Cabrillo Power I LLC is the owner/operator of the existing Encina Power Station ("EPS") and NRG Energy, Inc., its parent company, is processing the Carlsbad Energy Center Project ("CECP") Application for Certification before the California Energy Commission ("Energy Commission") on a portion of the EPS site between the railroad tracks and Interstate 5.

The original and ten copies of this letter are being filed directly with the City Clerk; we ask that the original be incorporated into the administrative record and the copies be timely distributed to all Council Members/Commissioners, City Attorney and City Manager. A courtesy copy has been emailed directly to the City Attorney.

A. Overview.

The CECP is a modern, environmentally beneficial and efficient natural gas fired combined cycle electrical generating facility that will result in the permanent shut down/replacement of three of the five existing, older EPS generating units realizing reduction of ocean water for "once through" cooling purposes and significant reductions in air pollutants/greenhouse gas emissions compared to existing EPS electrical generation. The CECP is fully consistent with the long

standing goal of the City, and NRG, for eventual retirement of the older EPS facilities west of the railroad tracks and replacement with a physically smaller, more efficient and cleaner generating facility between the railroad tracks and Interstate 5. The CECP is fully consistent with and implements the State Water Resources Control Board's 316(b) Policy to phase out use of once through ocean water cooling for electrical generation in favor of a closed loop cooling alternative.

The City's Project facilities are proposed to be located on the EPS property and encroach into the CECP area, which property is under the exclusive jurisdiction of the Energy Commission as part of the CECP process. Notwithstanding the obvious CECP benefits, the City has been a zealous opponent/participant throughout the CECP process before the Energy Commission and related governmental agencies, reportedly having spent in excess of $1.5 Million[1] in public funds to date to oppose the CECP, yet the City completely fails to evaluate its proposed Project's significant, adverse impacts and inconsistencies with the CECP and existing EPS operations. Further, the City's process to date and purported reliance on a mitigated negative declaration ("MND") is not consistent with the legal requirements of the California Environmental Quality Act ("CEQA"). It appears the City is proposing to proceed with its Project without regard to the CECP and other legitimate property owner rights as a continuation of the City's all out effort to block or otherwise interfere with the CECP. We hereby incorporate by reference the record of the CECP proceedings before the Energy Commission available at http://www.energy.ca.gov/sitingcases/carlsbad/index.html (in particular, the documents at http://www.energy.ca.gov/sitingcases/carlsbad/documents/index.html) as evidence of the City's familiarity with and active opposition to the CECP project.

B. City Failure to Provide Legally Adequate Notice to Landowner.

Under the City's own ordinances and State Planning and Zoning Law, as the landowner, NRG was to receive actual written notice of the Planning Commission hearings and proceedings at least ten (10) days prior to the February 2, 2011 Planning Commission hearings. (See Gov't Code Sec 65091 and Carlsbad Municipal Code Sec. 21.54). Further under CEQA, NRG should have received actual written notice of the City's intention to rely on a mitigated negative declaration and was to specifically include notification of the applicable comment period and details regarding the public hearings to consider the Project. (See CEQA guidelines Sec. 15072).

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[1] See attached Agenda Bill #20,216 dated April 27, 2010 stating: "Since 2008, the City of Carlsbad has approved and funded through the City's General Fund $1.5 million to pay for costs related to all legal and other related actions to respond to, and/or establish opposition to, the application submitted to the California Energy Commission by NRG for a new power plant ..."

NRG believes the required notices were never provided in accordance with applicable law because under well established California case law, due process requires that notice must be "...reasonably calculated to afford affected persons the realistic opportunity to protect its interests." (See *Horn v. County of Ventura* (1979) 24 Cal.3d 605).

Clearly, the City has known of the impacts of its Projects on NRG for years as evidenced by the multi-year Energy Commission CECP process started in September, 2007, the week long Energy Commission Evidentiary Hearings February 1-4, 2010 in Carlsbad, and periodic meetings/discussions (most recently in January, 2010) regarding the design/location of the sewer lift station and single sewer pipeline replacement and potential incompatibility of these facilities with the CECP. Yet, the City failed to meaningfully notify NRG of the proposed MND or the subsequent Planning Commission hearings as required by law.

Given these circumstances, it is clear the City has failed to provide the legally required actual written notices to NRG of the entire Project, all the while its staff was engaged in extensive engineering, design and environmental evaluation of a range of facilities it knew would have further significant, adverse impacts on NRG ownership and operation of the EPS and CECP.

C. City's Project Design and Engineering Incompatibilities.

The City's Project includes the design of a new lagoon utilities bridge to accommodate the future extension of the Coastal Rail Trail along the east side of the railroad tracks through the EPS (see Planning Commission Staff Report at p.2), a location that is well known to the City as incompatible with the CECP and unacceptable to the Energy Commission Staff and NRG. NRG is prepared to accommodate the Coastal Rail Trail in a location that is "mutually acceptable" to both the City and NRG, but the proposed Coastal Rail Trail along the sewer support bridge continuing easterly of the railroad tracks is unacceptable for reasons that have been fully vetted through the Energy Commission proceedings.

Further, the scope of the Project as presented to the Planning Commission far exceeds anything previously discussed with NRG. The Project is not simply a sewer lift station replacement and sewer force main replacement, but includes several additional pipelines and facilities, including: (1) a new "utilities bridge" over the lagoon (Note: Cabrillo Power I LLC owns fee title to the lagoon and its dredging/maintenance is a vital part of the EPS operations); (2) leaving the old 42 inch sewer line in place south of the lift station as a "parallel" line to the new force main; (3) new 54 inch sewer line north and south of the lift station; (4) a new pressurized 12 inch recycled water line from Encina Wastewater Treatment Facility ("EWTF") through the EPS even while the City claims recycled water is not available for CECP; (5) a new 6 inch potable water line through EPS; (6) a possible relocation of SDG&E natural gas line; and (7) substantially widening the existing limited 17.5 foot wide easement to 30 feet wide to accommodate the additional facilities.

The following list is intended to illustrate some of the unresolved issues regarding the ultimate design, engineering, construction timing, operational constraints and scope of the Project. Without definitive answers to these questions, the Project's actual environmental and EPS/CECP project impacts cannot be realistically evaluated. The Project, as proposed, lacks adequate details and specifics to support CEQA and Energy Commission CECP compatibility analysis.

1. Contrary to the details previously discussed with NRG, the Project is much more extensive, wider and involves multiple pipelines in the CECP area, representing much greater impacts to the CECP.

2. Proposed alignment of Coastal Rail Trail easterly of railroad tracks across the CECP area is not acceptable to NRG nor to Energy Commission Staff; the projected alignment is inconsistent with prior discussions/schematics prepared by City to avoid CECP/EPS operational interference.

3. City Project does not accommodate joint use of surface area for CECP heavy haul, surface access and ongoing power plant operations during CECP construction and subsequent operations of EPS/CECP.

4. City Project footprint conflicts with "construction lay down areas" long planned for CECP, new natural gas transmission line service extension to CECP and the existing and proposed storm water management facilities.

5. City has failed to indicate where its Project electrical power supply will be located and possible interference of Project electrical service with EPS/CECP construction/operation.

6. Project proposes significant new, additional pipelines in an existing "utility congested area", including the existing sewer line, SDG&E gas transmission line, overhead electrical lines, Poseidon desalination product water lines, railroad right of way and SDG&E substation facilities.

7. Project design fails to identify construction lay down areas for lift station/pipelines and access routes, both temporary (during construction) and permanent.

8. Project construction scheduling is unclear and potentially will interfere with other construction projects, including CECP, Poseidon desalination and adjacent SDG&E electrical distribution facilities and easements.

9. No provision is made for the vacation of the current lift station/single sewer pipeline easement presently vested in Vista Sanitation District and City of Carlsbad.

10. City Project removes existing mature vegetation/trees visual impact mitigation for CECP/EPS.

D. The Proposed MND is Inadequate, Incomplete and Insufficient to Comply with the Requirements of CEQA.

1. EIR Required. The City's reliance on a mitigated negative declaration for CEQA compliance is unsupportable. CEQA requires preparation of an environmental impact report ("EIR") whenever there is a "fair argument" that a project may have a significant unmitigated effect on the environment. (CEQA Guideline, § 15064(f)(1).) As set forth below, there is a "fair argument" that the Project will have significant environmental impacts. Even if that were not the case, the MND is inadequate in that it fails to fully analyze all of the Project's potentially significant environmental impacts and also relies on mitigation measures that will not avoid the identified significant environmental impacts. Therefore, there is a reasonable probability that implementation of this Project will have significant unmitigable adverse impacts on the environment. An EIR must be prepared to more fully analyze and disclose the Project's environmental impacts.

2. Project Description/Project Splitting. The Coastal Rail Trail alignment needs to be analyzed as part of the project description in an EIR. CEQA defines a "project" to include the "whole of an action" that may result in a direct or reasonably foreseeable indirect impact on the environment. (CEQA Guidelines, § 15378(a); *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 139 [CEQA review required before agency, as a practical matter, may commit itself to any feature of a project].) The City is careful not to call the Coastal Rail Trail alignment part of the "Project" saying that the Project will only *accommodate* "a future pedestrian trail." However, the City has made clear though its participation in Energy Commission and related proceedings that it intends to locate the Coastal Rail Trail east of the railroad tracks, even though the Energy Commission Staff determined that such location is inappropriate and potentially hazardous to the public safety. Nevertheless, the City notes that constructing the Coastal Rail Trail as part of this Project will implement the South Carlsbad Coastal Redevelopment Plan ("SCCRP") goal of "developing new beach and coastal recreational opportunities." (Staff Report, pp. 2, 8-9.) Under the circumstances, it is reasonably foreseeable that with approval of this Project, the City will seek to make this the east side of the tracks the actual location of the rail trail. Therefore, the failure to analyze the Coastal Rail Trail as an element of the Project constitutes "project splitting" in violation of CEQA. An EIR needs to be prepared that analyzes, among other things, the environmental impacts of having the public pass upon the trail route (e.g., trampling on nearby sensitive vegetation, littering into the lagoon, safety risks associated with people passing nearby the power plant, etc...).

The MND also notes that "overhead electrical distribution facilities will be relocated as needed" as part of the Project. (MND, p. 17.) Yet, there is no analysis of which overhead facilities might be relocated, where or how these facilities might be relocated or the environmental impacts associated with that possible relocation. Lastly, the MND states that the sewer support bridge

will not require any work to occur within the 100-year flood elevation. The bridge construction methodology, however, is not described and there is no other evidence supporting the City's claim that a bridge can be constructed over the lagoon without impacting sensitive lagoon resources. Similarly, the MND does not describe how the existing bridge can be removed without impacting the lagoon environment itself. All of these issues need to be further described and analyzed in an EIR.

3. Environmental Setting—Surrounding Land Uses. The MND does not adequately describe the surrounding land uses, in particular the Project's proximity to the EPS and the potential conflicts between the construction and operation of the Project, operation of the EPS and proposed construction and operation of the CECP. For example, the MND acknowledges that substantial grading/construction activities will occur on property owned by Cabrillo Power I LLC in connection with the sewer lift station, but there is no discussion of how to coordinate that construction with CECP construction, the risks of having Costal Rail Trail users in close proximity to EPS/CECP facilities, how the Project may impact NRG's use of the Project site as a heavy haul road, the risk of foundation failures created by placing new pipelines adjacent to existing electrical buildings and related construction injury risks. The MND does not fully disclose that substantially expanded easements will be required over EPS/CECP Property. (See also, Section C. above for more details regarding the design/construction incompatibilities.)

4. Aesthetics. MND fails to substantiate how removal of 12 mature eucalyptus trees for the new lift station will have a less than significant impact on views and no mitigation measures are identified to replace the mature trees. With no analysis of this issue, there certainly is a fair argument that removing these trees will have a substantial impact on aesthetics.

5. Air Quality. There are substantial problems with the Project's air quality analysis, including:

- Export. The MND discloses that 77,000 cubic yards of soil/gravel will be graded or trenched and 31,000 cubic yards will be exported to an "acceptable offsite location", assumed to be 30 miles away. The MND fails, however, to substantiate these assumptions which are key to the MND's conclusions. A revised CEQA document must be prepared identifying where the export likely is to be taken and the associated traffic/pollution impacts of the export hauling. The MND also fails to analyze the export soil's condition and discuss measures that will be implemented to ensure the export will be free of any hazardous materials. In the absence of these details, a fair argument exists that the Project will have significant air quality and perhaps hazardous materials impacts.

- Ozone. The San Diego Air Basin is in a Federal and State non-attainment area for the 8-hour ozone (O3) standard, yet there is no analysis of the City Project's

ozone contributions and impacts. (MND, pp. 35, 37.) One of the key precursors to the formation of ozone is NOx. As shown on Table 2 of the MND, the City Project will exceed the San Diego County APCD's threshold emission limit of significance for CEQA analysis of 250 pounds/day of NOx emissions (Project related construction emission of NOx are shown as 254.46 pounds/day and Table 2 of the MND notes this is a significant impact). As the San Diego Air Basin is in Federal and State non-attainment zones for the 8-hour ozone standard, and as NOx is one of the precursors for ozone, the Project will have a significant impact related to ozone generation. Additionally, the Project's emission of NOx and ROG all contribute to ozone formation in an ozone non-attainment area (the U.S. Environmental Protection Agency and California Air Resources Board define NOx and ROG as ozone precursors). An EIR disclosing and analyzing these ozone related impacts needs to be prepared before the Project can be approved.

The MND's analysis of cumulative ozone impacts is also flawed. The MND concludes the Project will not have a significant cumulative impact because the Project has only a "marginal temporary increase in NOx... air quality would be essentially the same whether or not the proposed project is implemented." CEQA does not permit unsubstantiated reliance on such a "de minimus" finding. Instead, a new CEQA document must be prepared that includes an actual and specific analysis of cumulative air quality impacts. Further, the MND fails to provide substantive facts to substantiate its "de minimus" conclusion.

Mitigation Measure AQ-1. The MND states incorrectly that the Project's significant emission of NOx can be mitigated with the inclusion of Mitigation Measure AQ-1. This mitigation measure requires observance of manufacturer's specifications for the proper maintenance of construction equipment and reduction in idling time. The MND fails to recognize that compliance with these practices is already assumed in the APCD's determination of emissions for construction activities. However, observance of construction equipment specifications is standard practice and are not capable of reducing the Project's NOx emissions below the APCD's significance threshold resulting in cummulative contribution to the continuing unmitigated exceedance of Federal and State 8-hour ozone standards. Accordingly, implementation of Mitigation Measure AQ-1 cannot be relied upon to reduce the emissions of NOx to less than significance.

- Sensitive Receptors. The MND analysis fails to acknowledge that the adjacent YMCA aquatic recreation area and Coastal Rail Trail may place sensitive receptors in close proximity to the Project (MND, pp. 37-38.) In the absence of

this analysis, a fair argument exists that approval of the Project would have an adverse impact on the environment.

- Odors. Air scrubbers and carbon filters are relied upon to control odors. Maintenance of these features should be required as a mitigation measure and included in the MMRP. (MND, p. 38.) Further, there is no evidence demonstrating that air scrubbers and carbon filters will effectively control noxious odors created by the Project.

6. Cultural Resources. Mitigation CUL-1 states "if significant resources are encountered, appropriate mitigation measures must be developed and implemented." This unlawfully defers development of adequate mitigation measures, which is particularly troubling here because at least two archeological sites are known to exist near the Project site. (MND, p. 51.) In the absence of adequate mitigation measures, approval of the Project does not avoid significant environmental impacts and therefore an MND is inappropriate.

7. Geology.

- The MND fails to analyze the potential adverse impacts to the adjacent planned uses, such as the CECP. In particular, there should be an analysis of the depth and strength of the pipeline construction and measures ensuring that construction and operation of pipelines will interfere with planned surface heavy haul and EPS/CECP operations.

- The MND fails to analyze the potential adverse impacts to the existing facilities. For example, the Project proposes to construct new pipelines adjacent to existing electrical buildings, which presents a potential risk of foundation failures. The safety risk of installing pipelines adjacent to and crossing under the existing high voltage wires should also be analyzed.

8. Greenhouse Gasses. The threshold of significance relied on in the MND is vague as it does not indicate what level of emissions might result in a direct or indirect significant impact. The analysis also fails to "make a good faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse emissions resulting from [the] project" as required by CEQA Guidelines section 150644(a). The City did not even attempt to engage in the qualitative or quantitative analysis required by the CEQA Guidelines. Instead, the MND concludes simply that emissions will be relatively minor and incrementally insignificant. CEQA does not permit the City to conclude that the Project will not have a significant environmental impact simply because its contribution will be "small" or "de minimus". (*Communities for a Better Env't v. California Resources Agency* (2002) 103 Cal.App,4th 98, 126.) The MND provides no evidence, let alone substantial evidence, to

demonstrate that the Project will not have a significant impact on greenhouse gas emissions. As such, it fails to meet the requirements of CEQA. The critically important issue of greenhouse gas emissions needs to be fully analyzed in an EIR.

9. Hazards.

- The MND fails to analyze the impacts resulting from a potential failure/collapse of the new single span bridge carrying sewer and other utility lines over the lagoon or the impacts of potential lift station/pipeline leaks.

- The MND fails to analyze the potential adverse impacts to the existing facilities, such as the safety risk of installing pipelines adjacent to and crossing the existing high voltage wires or having pedestrians along the Coastal Rail Trail in close proximity to the EPS/CECP.

10. Hydrology/Water Quality. The MND fails to identify measures that will be implemented to reduce or eliminate the possibility of a sewer spill into the adjacent wetlands or lagoon. Instead, the MND defers development of such measures until the construction phase. (MND, p. 66.) It is reasonably foreseeable that replacement of the existing sewer line could result in a spill which would damage sensitive environmental resources. As such, development of mitigation measures to prevent such a spill, and to prevent damage in the event of a spill, needs to be developed and publicly vetted as part of an EIR for the Project.

11. Recreation. There is no analysis of the physical impacts associated with having people use the coastal rail trail (see above) and bringing public recreation users within the perimeter of the power plant and lagoon. As discussed above, such an analysis is required under CEQA.

12. Cumulative Impacts. The cumulative impact analysis is conclusory and wholly inadequate. The MND identifies a list of cumulative projects and then concludes its analysis by stating:

> "It would be expected however, that environmental impacts associated with these development projects, plus the massive sewer CIP, could be mitigated to level that would be less than significant by means of mitigation measures similar in content to those identified in this Environmental Initial Study."

There is no specific analysis of any cumulative impacts nor evidence in the record that supports this conclusion in the MND. In particular, the MND fails with respect to the following:

- Aesthetics: There is no analysis of I-5 widening on aesthetics. The MND acknowledges that the bridge and lift station will be observable from I-5, but from

a distance of 1,600 feet away will not significantly contribute to a coastal view obstruction. The MND does not contain any substantive analysis of cumulative impacts on aesthetics from removal of the 12 trees and fails to take into account the proposed CECP project altogether.

- Air Quality. As discussed above, there is no specific cumulative air quality analysis considering cumulative ozone and other pollutant impacts, I-5 widening, and the CECP project.

- Greenhouse Gas Emissions. The MND fails to even attempt a cumulative greenhouse gas emissions analysis because emissions are not analyzed in the relevant general plans. CEQA requires the City to perform a good faith analysis of the cumulative impacts.

- Recreation. The MND fails to analyze the cumulative impact associated with other segments of the rail trail.

- CECP Power Plant Project. The MND acknowledges that "other [cumulative] impacts could result from the NRG Power Plant expansion project inasmuch as that project has not yet been specifically defined." Indeed, the CECP project has been specifically defined and a comprehensive environmental analysis that complies with CEQA has been performed by the California Energy Commission as required by the Warren-Alquist Act. This environmental analysis is set forth in the Energy Commission Preliminary and Final Staff Assessment which the City has actively and aggressively challenged. (See MND, p. 98). Therefore, it is disingenuous and factually inaccurate for the City to say that the NRG Power Plant project has "not been specifically defined." The September, 2007 filing of the CECP Application for Certification makes the CECP a "reasonably foreseeable" project and requires the City to treat the CECP as a reasonably foreseeable project for purposes of analyzing cumulative impacts as part of the CEQA analysis. (See also Section B. above for the City's full awareness of all CECP details as evidenced by the City's involvement in the Energy Commission multi-year certification process.)

As detailed above, the MND fails to comply with CEQA as it does not provide an adequate analysis of the Project's significant environmental impact and does not adequately mitigate the Project's significant environmental impacts. Moreover, an EIR, rather than a MND, must be prepared and certified before the Project can be approved by the City because there is a fair argument that the Project will have significant adverse environmental impacts.

E. Conclusion.

For all the reasons set forth above, the City's adoption of the Project is not legally supportable. The MND is inadequate under CEQA, and in fact, a full EIR is required to fairly analyze the significant environmental impacts of the Project, particularly when a realistic evaluation of adjacent "reasonably foreseeable" projects, including CECP, is included.

The proposed City Project is far more extensive than the Sewer Lift Station/Force Main replacement previously discussed. The easement widening and additional pipeline/facilities directly and adversely affect the EPS/CECP. Notwithstanding the multi-year Energy Commission proceedings, the City failed to give meaningful, timely notice of the full scope of its Project to the landowner most directly impacted.

Respectfully, NRG objects to certification of the MND and approval of the Project as presented until the significant outstanding issues are fully addressed and legally resolved.

Very truly yours,

Ronald W. Rouse

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of
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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
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APPLICATION FOR CERTIFICATION FOR THE CARLSBAD ENERGY CENTER PROJECT	**Docket No. 07-AFC-6 PROOF OF SERVICE (Revised 1/24/2011)**

Carlsbad Energy Center LLC's Applicant's Response to City of Carlsbad's Motion to Reopen Proceeding and Accept Testimony and Exhibits

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DECLARATION OF SERVICE

I, Judith M. Warmuth, declare that on March 28, 2011, I deposited copies of the aforementioned document in the United States mail at 500 Capitol Mall, Suite 1600, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

Judith M. Warmuth